STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS (ON REMAND)
(Bandstra, P.J., and Gage and Wilder, J.J.)

C.C. MID WEST, INC.,
a Michigan corporation,

Plaintiff-Appellant,

v.

HOWARD McDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA, individuals, jointly and severally,

Defendants-Appellees.

Supreme Court No. 123237

Court of Appeals Case No. 213386
(On Remand from Supreme Court as on Rehearing Granted)

Oakland Circuit Case No. 97-550272-NZ
Hon. Denise Langford-Morris

/

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

On May 8, 1998 the Oakland County Circuit Court, Hon. Denise Langford-Morris, entered an order granting summary disposition in favor of defendants-appellees. Plaintiff-appellant C.C. Mid West ("C.C. Mid West") timely filed a motion for reconsideration, which the court denied on July 13, 1998. C.C. Mid West timely filed a claim of appeal with the Court of Appeals, which on June 22, 2001 issued its first opinion affirming the trial court. C.C. Mid West timely applied to this Court for leave to appeal or for peremptory reversal, and the Court vacated the Court of Appeals opinion and remanded the matter for that court to decide the ERISA preemption issue. CC Mid West v McDougall, 466 Mich 894; 649 NW2d 75 (2002).

The Court of Appeals on January 17, 2003 issued its Opinion (On Remand), and C.C. Mid West on February 7, 2003 filed another Application for Leave to Appeal with this Court, which the Court granted on November 6, 2003. This Court therefore has jurisdiction under MCR 7.301(A)(2) and MCR 7.302(C)(2)(a).

STATEMENT OF QUESTION INVOLVED

Plaintiff is a non-union Michigan trucking company whose business depends upon contracting with truck owner-operators for their services. Defendants are the eight individual trustees of the Chicago-based Teamsters' pension fund and the fund's administrator, all of whom bear longstanding animus against plaintiff's corporate parent for competitive or union-related reasons. After defendants in 1997 knowingly made or authorized false representations to owner-operators regarding supposed pension benefits, which defendants knew to be false and which had the purpose and effect of causing the owner-operators to sever their contracts or cease negotiations with plaintiff, plaintiff filed this action, alleging tortious interference with contract and with business expectancies under Michigan common law.

After defendants' removal of the case to Federal court was rejected, they moved for summary disposition under MCR 2.116(C)(4), arguing that the court lacked subject-matter jurisdiction because Michigan tortious-interference law was preempted by the Federal Employee Retirement Income Security Act of 1974 ("ERISA"). Despite the fact that plaintiff has no connection with defendants' ERISA-governed fund, and despite plaintiff's submission of evidence showing that defendants' false representations had nothing to do with plan administration, and that they knew that at the time they made them, both the trial court and Court of Appeals (On Remand) found plaintiff's claims preempted by ERISA.

I. Did the Court of Appeals err in finding that ERISA preempts Michigan's common law of tortious interference with contract and business expectancy, where plaintiff is in no way part of or subject to ERISA's regulatory scheme, where defendants made no showing that Congress's "clear and manifest purpose" in enacting ERISA was to preempt State common law of tortious interference, an area of regulation historically left to the States, and where plaintiff produced unrefuted evidence that the threats were wholly unrelated to fund administration?

The Court of Appeals Answered: "No"
Defendants-Appellees Answer: "No"
Plaintiff-Appellant Answers: "Yes"

STATEMENT OF FACTS

I. Introduction

This is the second time this case has been before this Court. The first time, the Court at plaintiff's request vacated the original Court of Appeals Opinion and remanded the case so that the Court of Appeals could address the important issue of Federal preemption that its first Opinion sidestepped. The Court of Appeals has now done so, and has held that ERISA in this case preempts Michigan's common law of tortious interference with contract and with business expectancies, even though plaintiff has no connection with the pension plan that defendants administer. Plaintiff again appeals.

Plaintiff C.C. Mid West is a non-union trucking company that has nothing to do with any ERISA-governed pension plan. Defendants are the nine individuals who were then the trustees and administrator of the Chicago-based Teamsters' pension plan. Each has held longstanding animus toward C.C. Mid West and its corporate parent and owners, because of each defendant's affiliation with either the Teamsters' union, or with individual (unionized) trucking companies or associations that directly compete with C.C. Mid West and/or its parent.

In April 1997, numerous individual truck owner-operators, who had been Teamster-represented drivers in the past, were under contract to provide trucking services to C.C. Mid West on an independent-contractor basis. Many others were actively negotiating such contracts with C.C. Mid West. Defendants, acting upon their competitive and/or union-related animus for C.C. Mid West and its corporate parent and owners, threatened to deprive any owner-operator who maintained a contractual relationship with C.C. Mid West of the right to continue contributing, or "self-paying," to the Teamsters' pension plan. Even though defendants knew that the owner-operators were not eligible for that benefit under any circumstances, the owner-

operators were not aware of their ineligibility, and the threat had its intended effect. Many owner-operators who had already reached agreements with C.C. Mid West revoked their contracts, and others ceased negotiating with plaintiff, resulting in significant monetary losses for the company. C.C. Mid West filed this lawsuit in August 1997, alleging tortious interference with contracts and business expectancies under Michigan common law.

Defendants improperly removed the matter to Federal court, erroneously asserting the existence of a Federal question based on preemption under the Federal Employee Retirement Income Security Act of 1974 ("ERISA"). The case was remanded upon C.C. Mid West's motion. CC Mid West v McDougall, 990 F Supp 914 (ED Mich, 1998). Once back in State court, defendants in lieu of answering the complaint filed a motion for summary disposition, arguing that ERISA's general preemption provision, 29 USC 1144(a), preempts Michigan tortious-interference law and deprives the Circuit Court of subject-matter jurisdiction. Defendants also argued that the Complaint failed to state a claim and was subject to summary disposition under MCR 2.116(C)(8). The Circuit Court in May 1998 granted the motion based solely on ERISA preemption under MCR 2.116(C)(4).

C.C. Mid West appealed, and after the Court of Appeals' first Opinion was vacated by this Court – which instructed the Court of Appeals to address the ERISA preemption issue – the Court of Appeals issued its Opinion (On Remand), in which it held that ERISA preempts Michigan's common law of tortious interference. C.C. Mid West again appeals to this Court.

II. Defendants Seek To Cripple Plaintiff's Trucking Business

Plaintiff C.C. Mid West is a trucking company based in Warren, Michigan. (Apx 62a-63a, Complaint (hereafter "Compl") ¶¶ 1, 8). Defendant Ronald Kubalanza at all relevant times was employed as the administrator of the Central States, Southeast and Southwest Areas Pension

Fund, a multi-employer pension fund (commonly known as the "Teamsters' pension Fund," or "the Fund"). (Apx. 62a, 64a, Compl, ¶¶ 4, 13-14). The remaining defendants at all relevant times were trustees of the Fund – four former or current Teamster union officials, and four former or current trucking industry executives who are themselves managers or representatives of direct competitors of plaintiff. (Apx. 62a, 64a, Compl, ¶¶ 2-3, 14). C.C. Mid West has no involvement or connection with the pension plan that defendants administer.

Owner-operator/independent contractors are the lifeblood of plaintiff's trucking business. (See Apx. 64a-65a, Compl, ¶¶ 17-19). In March 1997, a separate transportation company that C.C. Mid West's corporate parent had sold to an unrelated party the preceding year, Central Transport, Inc., closed its doors and terminated approximately 235 people it had employed as truck drivers. (Apx. 63a-64a, Compl, ¶¶ 10-12; see also, Apx. 55a, 3/28/97 General Release, Settlement and Termination Agreement (hereafter "Termination Agreement"), p 1, ¶ 1). Prior to going out of business, Central Transport had made pension contributions on behalf of the drivers to the Teamsters' pension Fund. (Apx. 64a, Compl, ¶ 16). After their termination, defendants told the drivers that following their separation from employment, they could self-pay into the Fund without limitation. Id. This ability to self-pay pension contributions was of great value to former employees of Central Transport, many of whom at that time were within a few years of retirement, since it permitted them to safeguard their full pension benefits. (Apx. 65a, Compl, ¶ 21). As it turned out, however, the representation that they could self-pay into the Fund was knowingly false (see below).

In 1997 there was a severe nationwide shortage of qualified drivers in the trucking industry. C.C. Mid West began negotiations with the former Central Transport employees in an effort to enter into as many contractual agreements with them, on an owner-operator/independent

contractor basis, as it could. (Apx. 64a-65a, Compl, ¶ 18). C.C. Mid West entered into independent contractual agreements with 59 of them, who then began performing services for C.C. Mid West, and was actively negotiating with others. (Apx. 65a-68a, Compl, ¶¶ 19, 44). C.C. Mid West was also negotiating with other owner-operators in addition to the former Transport employees. (Apx. 68a, Compl, ¶ 46). Upon learning of C.C. Mid West's efforts, however, defendants (through defendant Kubalanza), in a deliberate effort to sabotage plaintiff's business, repeatedly threatened the former Central Transport employees that they would not be allowed to self-contribute if they contracted with any company affiliated with C.C. Mid West's corporate parent, CenTra, Inc., including C.C. Mid West. (Apx. 65a, 67a, 69a-70a, Compl, ¶¶ 20, 23, 37, 39, 53, 55). This threat was conveyed to the owner-operators both via letter (Apx. 75a-76a, Ex A to Compl) and in person, at a meeting with many of the owner-operators held in Ft. Wayne, Indiana on or about April 4, 1997. (Apx. 65a, Compl, ¶¶ 24-25). The threats were made known not only to all 235 former Transport employees, but also to owner-operators throughout the trucking industry. (Apx. 66a, Compl, ¶¶ 27, 29). The threats were never retracted. (Apx. 66a, Compl, ¶ 30).

Defendants knew or reasonably should have known that their threats would intimidate many, if not all, of the former Central Transport employees who had entered into contracts with C.C. Mid West into severing those ties, since C.C. Mid West is a CenTra affiliate, has no contractual connection to the Teamsters' pension Fund, and does not make pension contributions to it. (Apx. 66a-67a, Compl, ¶¶ 26-27, 32-40). Defendants also knew or should reasonably have known that the threat would have a chilling effect on negotiations between C.C. Mid West and former Central Transport employees with whom it had not yet concluded agreements, and would also deter other owner-operators throughout the trucking industry from entering into contractual

agreements with C.C. Mid West. (Apx. 66a, 68a-70a, Compl, ¶¶ 28-29, 43-57). The threats had no lawful connection with any legitimate administration of the Teamsters' pension Fund, but rather constituted a malicious attempt by defendants to act upon their own personal animus against C.C. Mid West, based on its non-union status, using as a weapon the illusory threat of disallowing self-payment. (Apx. 67a, 69a-70a, Compl, ¶¶ 39, 55). Indeed, at the time they issued the threats, defendants knew that the owner-operators would not be permitted to self-pay under any circumstances, as discussed below. The threat had its intended effects: Numerous owner-operators stopped driving for C.C. Mid West and took their trucks elsewhere, and the company has been seriously damaged as a direct result. (Apx. 68a, 70a-71a, Compl, ¶¶ 41, 57-62).

III. Material Proceedings In This Case

A. In The Circuit Court

C.C. Mid West filed this action in Oakland County Circuit Court in August 1997, alleging tortious interference with contract (relating to those owner-operators who severed their contracts following defendants' threats) and tortious interference with business expectancies (relating to those individuals who never reached contractual agreements with it because of the threats, including both former Transport employees and other owner-operators throughout the trucking industry), and seeking exemplary damages. (Apx. 61a-76a, Compl). All claims are based solely on Michigan common law. Defendants removed the case to Federal court, incorrectly arguing that ERISA preemption provided a basis for doing so. Upon C.C. Mid West's motion, the Hon. Gerald E. Rosen in early 1998 remanded the case to State court. CC Mid West v McDougall, 990 F Supp 914 (ED Mich, 1998)(Apx. 89a-99a).

Defendants then filed a motion for summary disposition under MCR 2.116(C)(4), arguing that the court lacked subject-matter jurisdiction because § 514(a) of ERISA, 29 USC 1144(a),

preempts Michigan's tortious interference law. In the alternative, defendants argued that summary disposition was appropriate under MCR 2.116(C)(8) because plaintiff's complaint failed to state a claim. After hearing arguments on May 6, 1998, (Apx. 25a-44a, Transcript), the Circuit Court in a ruling from the bench (Apx. 44a-53a) found C.C. Mid West's claims preempted, and granted defendants' motion for summary disposition under MCR 2.116(C)(4):

> In the instant case, this Court finds that the existence and administration of the Fund is a critical element of Plaintiff's claim. Plaintiff seeks to hold the Defendants liable under state law for their decisions about the self-pay benefits and for their communications with Fund participants. Both of these activities are ERISA concerns because the duties and liabilities of the Fund fiduciaries are defined by ERISA itself.
>
> Plaintiff is suing the Defendants because they made benefit determinations, namely that the former Central Transport drivers would not be allowed to continue to self-pay into the Fund if they went to work for an affiliate of CenTra, Inc., and the relief sought by Plaintiff would require the Defendants to either change their benefit determinations or would penalize the Defendants for their failure to change them. Plaintiff's claims are clearly "related to" an ERISA plan. The existence of the Fund is the essential element in Plaintiff's complaint. (Apx. 51a-52a, Transcript 5/6/98).

The Circuit Court did not address defendants' second ground for relief, failure to state a claim under MCR 2.116(C)(8). On May 8, 1998, the Circuit Court entered a written Order memorializing its ruling. (Apx. 5a-7a).

C.C. Mid West moved for reconsideration. In support, it submitted evidence showing not only that it sought no benefit determination in its lawsuit (not surprising, since it had not sued the Fund and has no connection to the Fund) but also that there was no benefit determination for defendants to make even with regard to the owner-operators. C.C. Mid West submitted the shutdown agreement that Central Transport negotiated with the union representing Central Transport's employees, demonstrating that the employees were terminated – not laid off – when the company closed on March 29, 1997. (Apx. 55a, Termination Agreement, p 1). C.C. Mid

West also submitted sworn deposition testimony from the fund's general counsel, given in another lawsuit, stating that a) the owner-operators would be unable, under any circumstances, to self-pay into the fund if they had been terminated (as opposed to laid off) by Central Transport, and that b) the general counsel had made fund staff (and presumably, defendants) aware of that fact during the period of time in which defendants were dangling the right to self-pay before the owner-operators, in an effort to drive them away from C.C. Mid West. (Apx. 77a-88a, excerpts of 1/13/98 Deposition of Thomas Nyhan, Esq.). Defendants in support of their motion had submitted only their May 7, 1997 letter, Ex A to the Complaint (Apx. 75a-76a). Despite C.C. Mid West's evidence, the Circuit Court denied the motion for reconsideration. (Apx. 9a-10a).

B. In the Court of Appeals, the First Time

C.C. Mid West timely appealed the trial court's decision to the Court of Appeals. On June 22, 2001, nearly a full year after oral argument, the Court of Appeals issued its first Opinion and Order. (Apx. 11a-16a). Rather than address the ERISA preemption issue that was the sole basis for the trial court's ruling, the Opinion stated, erroneously, that summary disposition had been granted pursuant to MCR 2.116(C)(8)(failure to state a claim) as well as (C)(4). (Apx. 11a, Opinion, p 1 & n 1). That was simply incorrect. Though defendants had given their motion the wordy title "Motion for Summary Disposition Pursuant to MCR 2.116(C)(4) – Lack of Subject-Matter Jurisdiction – and (C)(8) – Failure To State A Claim," and though the trial court's order referenced that verbose title, the substance of the Circuit Court's ruling was dismissal solely on grounds of ERISA preemption, under MCR 2.116(C)(4). (Apx. 44a-53a).

After erroneously recasting the issue as one of summary disposition under MCR 2.116(C)(8), the Court of Appeals found that the Complaint failed to state a claim upon which relief could be granted, affirmed summary disposition on that basis, and said that it did not need

to reach the ERISA preemption issue. (Apx. 13a-16a). The Court of Appeals on October 15, 2001 denied C.C. Mid West's motion for rehearing.

C. This Court Vacates The Court of Appeals' First Opinion, and Directs the Court of Appeals to Address the ERISA Preemption Question.

C.C. Mid West sought leave to appeal from this Court, arguing that its Complaint stated a claim sufficient to survive summary disposition under MCR 2.116(C)(8) and that the Court of Appeals had erred in not analyzing the ERISA preemption issue that formed the basis of the Circuit Court's summary-disposition ruling. As an alternative to granting leave, C.C. Mid West asked this Court to vacate the Court of Appeals' June 22, 2001 Opinion, and remand the matter for consideration of the ERISA preemption issue.

This Court vacated the first Court of Appeals Opinion, finding that "[o]n the facts of this case, it is error to say that the trial court's decision was granted pursuant to MCR 2.116(C)(8)." CC Mid West v McDougall, 466 Mich 894; 649 NW2d 75 (2002)(Apx. 17a). The Court remanded the case to the Court of Appeals as on rehearing granted "to decide the preemption issue." Id. After entertaining supplemental briefs, the Court of Appeals on January 17, 2003 issued its Opinion (On Remand), in which it held that ERISA preempts C.C. Mid West's

claimed in fields of traditional State regulation, a long line of U.S. Supreme Court precedent holds that the States' powers are not to be superseded by a Federal act unless that was the "clear and manifest purpose" of Congress. The party advocating preemption in such historically State-regulated areas bears a "considerable burden" in overcoming that presumption, and that burden should be even higher – indeed, insurmountable – when the asserted preemption is being wielded (as it is here) against a party that falls entirely outside the regulatory framework set up by the Federal statute. Because common-law tort liability is an area of traditional State regulation, and because defendants failed to meet their "considerable burden" of proving that Congress's "clear and manifest purpose" in enacting ERISA was to bar a party with no relation to any ERISA entity from asserting a claim under a State's common law of tortious interference, the Court of Appeals' preemption finding was erroneous.

Paradoxically, much of the Court of Appeals' Opinion (On Remand) tracks the above approach closely. It properly rejects defendants' (and the trial court's) various mischaracterizations of C.C. Mid West's claims and expressly finds that they are not disguised claims for ERISA benefits, do not arise out of an alleged breach of ERISA fiduciary duties and "are not intimately tied to 'core concerns of the ERISA legislation'..." (Apx. 22a-23a, Opinion (On Remand), pp 4-5). Further, the Court's recitation of the appropriate legal framework under which to analyze the preemption issue is in many respects also correct: it recognizes that where preemption is wielded against a common-law claim there is a presumption that Congress does not intend to supplant State law and the party urging preemption bears a "considerable burden" in overcoming that presumption, particularly where the subject law is in an area of traditional State regulation. (Apx. 21a, Opinion (On Remand), p 3).

The Court of Appeals, however, plainly misapplied that framework to the facts of this case. Its finding that resolution of C.C. Mid West's claims would require a determination of whether defendants' communications were appropriate under the Fund, thereby requiring more than a "cursory examination" of the Fund's provisions, is erroneous, and its attempt to distinguish Darcangelo v Verizon Communications, Inc, 292 F3d 181, 193 (CA 4, 2002) fails. Contrary to the Court's assertion, (Apx. 23a, Opinion (On Remand), p 5), C.C. Mid West in its Complaint does in fact allege "improper conduct so unrelated to the plan that it cannot be termed 'plan administration' of any sort" – just as the plaintiff did in Darcangelo, where the Fourth U.S. Circuit Court of Appeals found State-law claims not preempted. Indeed, C.C. Mid West did not merely plead such conduct, it supported that charge with evidence. The Court of Appeals' Opinion (On Remand) simply cannot be squared with Darcangelo.

Moreover, the Opinion (On Remand) contains a glaring internal contradiction that requires a finding of no preemption under the very authority on which it relies. The Opinion correctly states that "[i]t is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit," (Apx. 22a, Opinion (On Remand), p 4, citing MacKay v Grumman Allied Industries, Inc, 993 F Supp 1068, 1070 (WD Mich, 1997) and Cromwell v Equicor-Equitable HCA Corp, 944 F2d 1272, 1276 (CA 6, 1991)). In the very next paragraph, the Opinion also correctly acknowledges that C.C. Mid West does not seek ERISA Plan benefits. (Apx. 22a)("Defendants also claim that plaintiff merely disputes a benefits determination that defendants made that allegedly caused harm to the plan participants and that plaintiff is actually making a claim for benefits on behalf of the drivers. We are compelled to disagree with defendants' characterization of plaintiff's claims"). Despite this explicit recognition, the Court of Appeals nevertheless concluded that

ERISA preempts C.C. Mid West's claims, a conclusion that is erroneous under the very authority – MacKay and Cromwell – on which the court relied.

Finally, the Court of Appeals in conducting its analysis fundamentally misapplied the standards for resolving a motion for summary disposition under MCR 2.116(C)(4). As with motions for summary disposition under MCR 2.116(C)(10), the court in analyzing a motion under subrule (C)(4) may grant such a motion only if there is no genuine issue of material fact as to a lack of subject-matter jurisdiction. As with a motion under subrule (C)(10), a court in resolving a (C)(4) motion must look beyond the pleadings, and consider any affidavits or other such evidence offered by the parties. MCR 2.116(G)(5). Here, however, only C.C. Mid West offered any record evidence: defendants' protestations that they were simply administering their pension plan came solely in the form of arguments in their briefs and other unsworn papers, since they never answered the Complaint. The Court of Appeals in deciding to accept defendants' unsworn assertions has not and cannot cite to any evidence in support of them – and certainly not evidence sufficient to create a genuine issue of material fact, when weighed against C.C. Mid West's "smoking gun" documentation. Indeed, in its Opinion (On Remand), the only source the Court cited for its conclusion was its now-vacated first Opinion. (Apx. 23a, Opinion (On Remand), p 5, citing Apx. 15a, Opinion, p 5).

Proper application of ERISA preemption case law and the analytical framework for a motion under MCR 2.116(C)(4) must result in reversal of the Court of Appeals' Opinion (On Remand), and reinstatement of C.C. Mid West's claims.

STANDARD OF REVIEW

The determination of preemption involves statutory interpretation, which is a question of law. Konynenbelt v Flagstar Bank, 242 Mich App 21, 27; 585 NW2d 300 (2000). Likewise,

jurisdictional questions raised via motion for summary disposition under MCR 2.116(C)(4) present questions of law that are reviewed *de novo*. Travelers Ins Co v Detroit Edison, 465 Mich 185, 205-206 & n 18; 631 NW2d 733 (2001). When reviewing a motion for summary disposition under MCR 2.116(C)(4), the Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. Walker v Johnson & Johnson Vision Prods, Inc, 217 Mich App 705, 708; 552 NW2d 679 (1996).

The Court of Appeals failed to do that, and instead credited defendants' unsworn statements from their motion papers and brief, over the allegations in the Complaint and C.C. Mid West's record evidence, which allege and show that the threats to the owner-operators had nothing to do with ERISA plan administration. The Court of Appeals's misapplication of the standard of review was central to its erroneous finding that ERISA preempts plaintiff's claims.

ARGUMENT

I. ERISA Does Not Preempt State Common-Law Claims Brought By An Entity That Is Wholly Outside the Bounds of ERISA's Regulatory Framework.

A. The Statutory Background of ERISA Preemption.

ERISA was enacted in 1974 to establish a comprehensive, federalized regulatory scheme covering pension and welfare/benefit plans. Its general preemption provision, § 514(a) (codified at 29 USC 1144(a)), states that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...."[2] Congress' primary goal in enacting that provision was to "eliminate the threat of conflicting and inconsistent State and local regulation" and to "avoid a multiplicity of regulation in order to permit the nationally uniform administration

[2] In keeping with MCR 7.212(C)(7), the full text of 29 USC 1144 is attached as an addendum to this brief.

of employee benefit plans." New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins Co, 514 US 645, 657; 115 S Ct 1671, 1677-78; 131 L Ed 2d 695 (1995) citing 120 Cong Rec 29197, 29933 (1974); see also Teper v Park West Galleries, Inc, 431 Mich 202, 212-213; 427 NW2d 535 (1988), citing Fort Halifax Packing Co, Inc v Coyne, 482 US 1, 11; 107 S Ct 2211; 96 L Ed 2d 1 (1987).

Prior to 1995, the U.S. Supreme Court endorsed a sweeping interpretation of § 1144(a) preemption, one that resulted in preemption of nearly any State-law claim that in any way "related to" an ERISA plan, at least when brought by an ERISA entity. Thus, in a variety of cases decided in the first two decades of ERISA's existence, the U.S. Supreme Court observed that the statute's general preemption provision was "clearly expansive," with a "broad scope" and an "expansive sweep," and was "conspicuous for its breadth." See California Div of Labor Stds Enforcement v Dillingham Construction, NA, Inc, 519 US 316, 324; 117 S Ct 832, 837; 136 L Ed 2d 791 (1997)(citing pre-1995 cases).

Beginning in 1995, however, the Court scaled back § 1144(a) preemption dramatically, noting that the terms "relate to" and "connection with" are not very helpful in determining the limits of ERISA's preemptive powers. Travelers, 514 US at 655; 115 S Ct at 1677. In fact, the Court has all but consigned its earlier attempts to construe the term "relate to" to the judicial scrap heap. As that court noted unanimously in Travelers,

> ...[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for 'really, universally, relations stop nowhere'. . .we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here" [514 US at 655; 115 S Ct at 1677 (internal citation omitted)].

As Justice Scalia noted in his concurrence in Dillingham Construction, "[t]he statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that

no sensible person could have intended – which it is not." 519 US at 335-336; 117 S Ct at 843 (Scalia, J., concurring). (Indeed, the Court of Appeals' Opinion (On Remand) agreed with C.C. Mid West that this sea change in ERISA preemption analysis had taken place, and expressly rejected defendants' denial of it. (Apx 21a)(discussing Travelers and DeBuono v NYSA-ILA Medical and Clinical Svcs Fund, 520 US 806; 117 S Ct 1747; 138 L Ed 2d 21 (1997))).

Post-Travelers, proper ERISA preemption analysis begins with a recognition that § 1144(a) is not intended to modify "the starting presumption that Congress does not intend to supplant state law." 514 US at 654-655; 115 S Ct at 1676 (citation omitted); see also, DeBuono, 520 US at 813-814; 117 S Ct at 1751. Section 1144(a) now cannot be read to preempt all State-law claims that can simply be said to "relate to" an ERISA plan, a trend Michigan courts acknowledged as early as 1997. See BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan, 217 Mich App 687, 693; 552 NW2d 919 (1996), *lv den*, 456 Mich 879; 570 NW2d 782 (1997) *and cert den*, 522 US 1153; 118 S Ct 1178; 140 L Ed 2d 186 (1998), citing DeBuono (ERISA does not preempt plaintiff's State-law claims; statute's use of the term "relate to" is so vague as to be meaningless). Under current analysis, a State law "relates to" an ERISA plan and is thus preempted only if it has "a connection with" or "reference to" the plan. Travelers, 514 US at 656; 115 S Ct at 1677, citing Shaw v Delta Air Lines, Inc, 463 US 85, 96-97; 103 S Ct 2890; 77 L Ed 2d 490 (1983); Dillingham Construction, 519 US at 324; 117 S Ct at 837. Post-Travelers, § 1144(a) has been construed to preempt in only two instances: where the State law in question either 1) mandates employee benefit structures or their administration, or 2) provides an "alternative enforcement mechanism" for ERISA benefits. See Dishman v UNUM Life Ins Co

of America, 269 F3d 974, 981-984 (CA 9, 2001)(citing Travelers and other cases). Michigan common law of tortious interference, as asserted by C.C. Mid West in this lawsuit, does neither.[3]

Long before Travelers, both this Court and the U.S. Supreme Court recognized that "where Congress legislates in a field which the States have traditionally occupied...we start with the assumption that the historic police powers of the States are not to be ousted by the Federal Act unless that was the clear and manifest purpose of Congress." Teper, 431 Mich at 217-218 & n 15 (emphasis added)(internal quotes, brackets and citation omitted); see also Travelers, 514 US at 655; 115 S Ct at 1676-77; Dillingham Construction, 519 US at 325; 117 S Ct at 838 (citing Travelers and Rice v Santa Fe Elevator Corp, 331 US 218, 230; 67 S Ct 1146, 1152; 91 L Ed 2d 1447 (1947)); Scheuneman v General Motors (On Rem), 243 Mich App 210, 215; 622 NW2d 525 (2000), *lv denied*, 465 Mich 945; 639 NW2d 806 (2002)(workers' compensation is traditionally an area of State authority, and coordination-of-benefits provision of WDCA affects ERISA plan in too tenuous, remote and peripheral a fashion to overcome presumption against

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[3] This Court's pre-Travelers decision in Teper articulated a slightly different preemption test than the U.S. Supreme Court's "connection with" standard, stating that ERISA generally preempts where State law interferes with an ERISA plan by 1) altering the level of benefits that would be paid out under a given plan from State to State, 2) altering the terms of a plan, such as requirements for eligibility, or 3) subjecting plan fiduciaries to claims other than those provided for in ERISA itself. 431 Mich at 214. But this case can be resolved without deciding whether Teper should be revisited, since Teper involved a plaintiff who was among the ERISA-governed entities (a plan participant) and is thus clearly distinguishable from cases brought by ERISA outsiders like C.C. Mid West, who have no connection to the Act's regulatory framework.

Indeed, the third Teper requirement, which would preempt any State law that subjects fiduciaries to claims "other than those provided for in the ERISA itself," cannot be applied against non-ERISA entities. It would preempt all claims brought by ERISA outsiders, when, as longstanding U.S. Supreme Court authority teaches, "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts" clearly are not preempted. Mackey v Lanier Collection Agency & Svc, Inc, 486 US 825, 833; 108 S Ct 2182, 2187; 100 L Ed 2d 836 (1988). In any event, C.C. Mid West is suing defendants for misdeeds that are well beyond the scope of what they are authorized to do under ERISA, as even the Court of Appeals noted in recognizing that defendants are not being sued as fiduciaries. (Apx. 22a, Opinion (On Remand), p 4).

preemption). The party advocating preemption in such historically State-regulated areas bears a "considerable burden" in overcoming that presumption. DeBuono, 520 US at 814; 117 S Ct at 1751-52, citing Travelers, 514 US at 654; 115 S Ct at 1676. It is beyond dispute that common-law tort liability is an area of traditional State regulation. Teper, 431 Mich at 218 & n 15, citing Tribe, American Constitutional Law (2d ed), pp 499-500, and Silkwood v Kerr-McGee Corp, 464 US 238; 104 S Ct 615; 78 L Ed 2d 443 (1984)(there is a "long tradition of state concern with the compensation of victims of negligently, recklessly, or intentionally inflicted injury"); see also Coyne & Delany v Selman, 98 F3d 1457, 1467 (CA 4, 1996). Yet the Court of Appeals' Opinion makes no mention of this "clear and manifest purpose of Congress" test, in determining whether Michigan law in this historically State-regulated area is preempted on these facts.

Further, while the Opinion (On Remand) does acknowledge that there is a starting "presumption that Congress does not intend to supplant state law," (Apx 21a, citing Travelers, 514 US at 654; 115 S Ct at 1676), see also DeBuono, 520 US 813-14; 117 S Ct at 1751, and that a party advocating preemption in historically State-regulated areas bear a "considerable burden" in overcoming that presumption (Apx 21a, citing DeBuono, 520 US at 814; 117 S Ct at 1751-52), see also Travelers, 514 US at 654; 115 S Ct at 1676, its failure to apply those important precepts renders its citation of them little more than lip service. For the Opinion (On Remand) does not appear to have required defendants to overcome any presumption against preemption, much less shoulder the "considerable burden" that should have been imposed on them to show that Congress's clear and manifest purpose in adopting ERISA was to supplant State common law in this historically State-regulated area.

Last, and perhaps most important, the Court of Appeals Opinion also makes no mention whatsoever of the U.S. Supreme Court's holding in Mackey v Lanier Collection Agency & Svc,

Inc, 486 US 825, 833; 108 S Ct 2182, 2187; 100 L Ed 2d 836 (1988) that "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan – are relatively commonplace [and] although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA § 514(a)" (emphasis added)(citations omitted). This case – at most – is the very sort of run-of-the-mill tort claim, and indeed is even less intrusive than those discussed in Mackey, since it is not brought against the Fund itself. The trial court's ruling referred obliquely to this language from Mackey, (Apx. 49a-50a), though the trial court never explained why that principle does not apply to protect C.C. Mid West's State-law tort claims from preemption. Worse, the Court of Appeals Opinion (On Remand) does not even mention Mackey and this important principle that predates even the post-1995 change in ERISA preemption analysis.

Applying current preemption analysis, it is clear the Court of Appeals Opinion (On Remand) reversibly erred.

B. Defendants Cannot Meet Their "Considerable Burden" Of Showing That Congress Intended For ERISA To Preempt State Tortious Interference Law Where It Is Asserted By A Non-ERISA Entity.

While the Court of Appeals may be correct in noting that past U.S. Supreme Court rulings have been "at least mildly schizophrenic" in charting the boundaries of ERISA preemption, (Apx. 21a)(citations and internal brackets omitted), the case law shows clearly that even at its high-water mark (pre-1995), ERISA did not preempt claims brought by ERISA outsiders. Congress did not intend for ERISA's general preemption provision to reach State-law claims brought by parties such as C.C. Mid West, that are outside the constellation of entities regulated by ERISA, so as to deprive such non-ERISA entities of any relief whatsoever for tortious conduct inflicted upon them.

ERISA is a "comprehensive and reticulated statute" that establishes an elaborate administrative framework to govern the relationship between "participants," "beneficiaries" and "fiduciaries" of ERISA-governed plans, as well as plans themselves and the United States Secretary of Labor. See generally Mertens v Hewitt Associates, 508 US 248, 251; 113 S Ct 2063; 124 L Ed 2d 161 (1993), citing Nachman Corp v Pension Benefit Guaranty Corp, 446 US 359, 361; 100 S Ct 1723; 64 L Ed 2d 354 (1980); see also 29 USC 1002(6)-(8)(defining "employee," "participant" and "beneficiary"). The overwhelming trend in ERISA preemption analysis is to recognize that preemption simply is not implicated where the plaintiff bringing a State-law claim is an entity beyond that regulatory framework. Thus, in Thrift Drug v Universal Prescription Administrators, 131 F3d 95 (CA 2, 1997), Thrift Drug, a pharmacy, filed a State-law breach-of-contract action against a prescription benefits plan administrator, UPA, alleging that UPA failed to reimburse Thrift for prescriptions it had dispensed. As defendants do here, UPA argued that the claim was preempted because it was in essence a "claim for benefits under ERISA benefit plans, on behalf of the participants and beneficiaries in the welfare benefit plans." The Second U.S. Circuit Court of Appeals rejected that notion, noting that Thrift "plainly does not represent any participants or beneficiaries" of defendants' ERISA Plan:

> In this simple contract cause of action, Thrift represents only itself in seeking reimbursement from UPA for the prescriptions Thrift dispensed. Thrift's contract claim has no effect on employee benefit structures or their administration and does not interfere with the calculation of any benefits owed to any employee. In short it relates only to the contractual relationship between a plan and its service provider and does not remotely touch upon the relationship between the plan and its beneficiaries. Therefore ERISA pre-emption is not implicated. [131 F3d at 98].

Similarly here, any claims the drivers may have against the Teamsters' pension Fund are absolutely immaterial to, and not part of, this lawsuit. As even the Court of Appeals noted, C.C. Mid West is not pursuing benefits for the owner-operators, or the right to self-pay, or anything

else on their behalf. C.C. Mid West wants defendants to make it whole for their malicious act of trying to cripple the company as punishment for its non-union status. ERISA is not implicated. (Notably, after the court in Thrift Drug rejected defendants' attempt to hide behind ERISA preemption, plaintiff prevailed at trial on its common-law breach-of-contract claim, and obtained a judgment of $59,472 plus pre-judgment interest. Thrift Drug v Prescription Plan Service Corp, 1 F Supp 2d 387 (SDNY, 1998)).

In Aetna Casualty and Surety Co v William M Mercer, Inc, 173 FRD 235 (ND Ill, 1997), plaintiff-insurer brought state-law negligence, breach-of-contract and contribution claims against a nonfiduciary actuarial/consultant, on behalf of an ERISA plan, claiming that the defendant's failure to discharge his duties caused substantial losses for the plan. Though defendant argued ERISA preemption, the court (citing Dillingham Construction) held that the claims were not preempted because they affected neither the relationships governed by ERISA, nor the benefits or administration of an ERISA plan, nor ERISA's enforcement scheme:

> Congress did not intend to preempt "traditional state-based laws of general applicability [that do not] implicate the relations among the traditional ERISA plan entities," including the principals, the employer, the plan, the plan fiduciaries and the beneficiaries. . . .Ultimately, if there is no effect on the relations among the principal ERISA entities – the employer, the plan, the plan fiduciaries and the beneficiaries – there is no pre-emption. As a corollary, actions that affect the relations between one or more of these plan entities and an outside party similarly escape pre-emption.

173 FRD at 238 (emphasis added)(citations and internal quotations omitted); see also Barringer v Parker Bros Employee Retirement Fund, 877 F Supp 358, 362 (SD Tex, 1995) (tortious-interference and other State-law claims brought against ERISA fund by investors who had obtained a loan from it were not preempted; plaintiffs were third parties to the plan); Redall Industries, Inc v Wiegand, 876 F Supp 147,151-52 (ED Mich, 1995) (State-law action by ERISA plan trustees vs. "outside" actuarials, accountants and administrators not preempted); Lopresti v

Terwilliger, 126 F3d 34,41 (CA 2, 1997) (State-law conversion claim by ERISA plan trustees against president of signatory corporation for failure to tender withheld dues to union not preempted; dues were not "plan assets" subject to ERISA); Agrawal v Paul Revere Life Ins Co, 205 F3d 297, 302 (CA 6, 2000), citing Smith v Provident Bank, 170 F3d 609, 616-617 (CA 6, 1999)("When Congress has designed a mechanism to enforce rights or duties of ERISA entities, the broad preemption of ERISA will prevent application of state law. However, state law claims involving non-ERISA entities are not preempted"); BPS Clinical Labs, 217 Mich App at 696-97.

Strehl v Case Corp, 1997 WL 695729; 1997 US Dist Lexis 17681 (ND Ill, 1997), noted a hierarchy of claims for purposes of ERISA preemption: "clearly" pre-empted are plan beneficiaries' claims for the denial of ERISA benefits as well as beneficiaries' claims that are not directly for benefits, but nevertheless have an impact on the plan or the amount of benefits provided. "In contrast, a claim by a plan beneficiary that arises in the context of an ERISA plan but has no relationship to or effect upon the plan is not necessarily preempted." Id at *3. Even less likely to face preemption are participants' "run-of-the-mill" tort claims that fall outside the bounds of the plan; "[t]hus, a negligence claim brought by a beneficiary who slips on a banana peel while visiting the office of her ERISA administrator would not be preempted, despite the potential effect a financial award to the plaintiff may have on the plan." Id.

> Finally, most tenuous are run-of-the-mill tort cases in which the plaintiff is not a plan participant and the claim is neither based on obligations created by the plan nor seeks benefits from the plan. . . .

Id at *4 (emphasis added).

The claim in Strehl – brought by a chiropractor who sought damages arising from a defamatory letter issued by defendants (who were also ERISA fiduciaries) to plan participants (the chiropractor's patients) – fell into this last category. While the cause of action would not

have arisen "but for the existence" of the ERISA plan, it was too remote to give rise to preemption because: 1) it did not involve the denial of plaintiff's rights under the terms of the plan; 2) it did not affect the plan; and 3) it did not involve a determination of whether benefits are due under the plan. Id, at *4 (citation omitted). Along the same lines, in Grand Park Surgical Ctr v Inland Steel Co, 930 F Supp 1214, 1217-18 (ND Ill, 1996), a surgery center's tortious-interference claim against an employer that sent letters to the center's patients telling them not to pay medical bills because the center was engaging in "substantial overcharging and inappropriate and unnecessary care" was not preempted: plaintiff's theory of recovery did not refer to the ERISA plans, the center was not seeking recovery of benefits from the employer but rather damages from it in the amount caused by its exhortations to the patients/plan participants, and any damages would be paid by the employer, not the ERISA plans.

Even where a State tort claim against ERISA fiduciaries arises directly out of the performance of their fiduciary duties, it is not preempted if it involves a State law of general applicability and the plaintiff is not an ERISA-governed entity. In Inverness Corp v McCullough, 1999 WL 1225231; 1999 US Dist Lexis 19557 (D Mass, 1999), defendants, trustees of an ERISA pension plan, invested certain funds with plaintiffs. After the government began an investigation of defendants' finances, defendants demanded that plaintiffs prematurely return the investment, but plaintiffs refused. Defendants then allegedly launched a "smear" campaign against plaintiffs, writing letters to plaintiffs' business and financial associates that impugned their reputation, undermined plaintiffs' various business ventures and suggested that plaintiffs were involved in criminal activity. Plaintiffs sued, alleging State-law claims of interference with advantageous business relationship, slander and unfair and deceptive business practices. The court held that ERISA did not preempt those claims, because the torts were State

laws of general applicability, and plaintiffs were neither beneficiaries, participants nor fiduciaries of an ERISA plan, nor did they seek Plan benefits.

Indeed, at least one court has gone a step further, refusing to hold preempted a common-law claim for defamation brought by an employer against the administrator of its employee health-benefits fund, even though plaintiff was an ERISA entity: the claim was between two commercial entities and akin to the "run of the mill" claims allowed by Mackey; it was not a claim for benefits and did not concern the scope or existence of benefits; recognition of it would not conflict with Congress' intent to subject ERISA plan sponsors to a uniform body of law; the damages sought were not measured by the terms of the Plan; it did not threaten the ERISA-governed relationship between fiduciaries and beneficiaries; and the terms of the plan were not material to the elements of the State-law claim, but were rather "merely background information" regarding it. Vescom Corp v American Heartland Health Administrators, Inc, 251 F Supp 2d 950, 968-969 (D Maine, 2003). Each of those things could be said about C.C. Mid West's claims, as well.

As Judge Jansen of the Court of Appeals noted in her partial dissent in Clayton Group Svcs, Inc v First Allmerica Financial Life Ins Co, unpublished opinion per curiam of the Court of Appeals, decided 7/26/02 (Docket No. 226491) (Apx. 142a), the fact that a claim is not solely between ERISA entities

> is crucial because there is a substantial and cohesive body of case law in the federal circuit courts of appeal holding that state laws involving traditional areas of state regulation not affecting relations among principal ERISA entities will not be preempted. Abraham v Norcal Waste Systems, Inc, 265 F3d 811, 820 (CA 9, 2001); Geweke Ford v St Joseph's Omni Preferred Care Inc, 130 F3d 1355, 1360 (CA 9, 1997); Arizona State Carpenters Pension Trust Fund v Citibank, 125 F3d 715, 724 (CA 9, 1997); Wilson v Zoellner, 114 F3d 713, 718-719 (CA 8, 1997); Morstein v National Ins Services, Inc, 93 F3d 715, 722 (CA 11, 1996); Custer v Sweeney, 89 F3d 1156, 1167 (CA 4, 1996); The Meadows v Employers Health Ins, 47 F3d 1006, 1009 (CA 9, 1995); Airparts Co, Inc v Custom Benefit Services

of Austin, Inc, 28 F3d 1062, 1065 (CA 10, 1994); Perkins v Time Ins Co, 898 F2d 470, 473 (CA 5, 1990). [(Apx. 142a)].[4]

The current view is that "where state law claims fall outside the three areas of concern identified in Travelers,...arise from state law of general application, do not depend upon ERISA, and do not affect the relationships between the principal ERISA participants; the state law claims are not preempted." Id, quoting Arizona State Carpenters, 125 F3d at 724]; see also, Lion's Volunteer Blind Indus, Inc v Automated Group Admin, 195 F3d 803, 807-08 & n3 (CA6, 1999)(where ERISA provides no remedy, it does not preempt)).

In all relevant aspects this case is on all fours with Thrift Drug, Strehl, Grand Park Surgical Center, Inverness and others involving non-ERISA plaintiffs. As the Court of Appeals correctly recognized – expressly rejecting defendants' arguments to the contrary, as Judge Rosen did five years earlier – C.C. Mid West is not a party to the Teamsters' pension Fund, is not an "employer" contributing to the Fund, is not suing for Plan benefits, and seeks nothing from the Teamsters' Fund itself. (Apx. 22a, Opinion (On Remand), p 4). C.C. Mid West is not among the traditional ERISA entities – fiduciary, participant, beneficiary, contributing employer or Plan. Its claims "are not intimately tied to 'core concerns of the ERISA legislation'..." (Apx. 23a, Opinion (On Remand), p 5). It brought suit solely on its own behalf, seeking redress for the substantial harm that these defendants did to it because of its non-union status. (Apx. 22a, Opinion (On Remand), p 4). C.C. Mid West has no recourse against defendants under ERISA, and preemption of Michigan tortious-interference law would leave it with absolutely no recourse at all. That is why defendants seek to invoke preemption, and it is why, as the overwhelming

[4] As an unpublished decision, neither the majority opinion in Clayton Group Svcs nor Judge Jansen's partial dissent were binding on the Court of Appeals, and clearly they are not binding on this Court. Nevertheless, C.C. Mid West cites this case because Judge Jansen's partial dissent thoroughly catalogs the clear and unmistakable trend among the Federal circuit courts of appeal not to apply ERISA preemption against an ERISA outsider.

weight of the case law authority shows, that effort must fail. The relationship between C.C. Mid West and defendants is outside ERISA's regulatory framework, and C.C. Mid West's claims therefore are not preempted.

The Court of Appeals committed a fundamental error in stating that "the fact that plaintiff may be left without a meaningful remedy does not alter the fact of preemption." (Apx. 24a, Opinion (On Remand), p 6). In both cases that the court cited for that proposition, Muse v IBM, 103 F3d 490, 495 (CA 6, 1995) and Massachusetts Cas Ins Co v Reynolds, 113 F3d 1450, 1454 & n 2 (CA 6, 1997), the plaintiff(s) "left without a meaningful remedy" were ERISA entities: plan participants, or plaintiffs claiming to be. The plaintiff in Reynolds was a participant seeking benefits under an ERISA disability plan, and the plaintiffs in Muse were employees who brought claims under ERISA, claiming that misrepresentations made by their employer to induce them into taking a less-generous early retirement plan violated ERISA's fiduciary duty requirements. In both cases, plaintiffs were squarely within ERISA's regulatory scheme, based either on the facts (Reynolds) or their own allegations (Muse). Thus, both cases stand for the unremarkable proposition that lawsuits that seek recovery of an ERISA benefit will be preempted, even where they are dressed up to masquerade as State common-law claims, because Congress in enacting ERISA decided to limit plaintiffs to whatever relief (if any) is available under ERISA. See Lion's Volunteer Blind Indus, 195 F3d at 808 (ERISA withdrawal liability claims disguised as fraud claims, and claims for ERISA benefits disguised as claims for promissory estoppel, breach of contract and misrepresentation were clearly preempted since they "went to 'the very heart of issues within the scope of ERISA's exclusive regulation'"). Or, as put in Dishman, such claims are preempted because they seek to use State law as an "alternative enforcement mechanism" to ERISA. 269 F3d at 981. Such authority is simply inapplicable to this case, and neither the Court

of Appeals nor defendants have cited a single case in which preemption was applied so as to deprive a non-ERISA entity, such as C.C. Mid West, of all legal recourse.

The Court of Appeals' conclusion that application of Michigan's tortious-interference law would require analysis of the Teamster pension Fund's terms and administration, and the propriety of defendants' communications with the owner-operators, (Apx. 23a, Opinion (On Remand), p 5), also is incompatible with Thrift Drug, Strehl, Grand Park, Inverness Corp, and other such cases. Each of those cases also involved the sort of conduct that defendants here characterize as "core fiduciary acts" – communications by ERISA fiduciaries, to participants, arising out of benefit determinations, fund investment decisions, etc. Each claim was brought by a plaintiff who was a non-ERISA entity, and whose business dealings with a third party had been fouled by communications from defendants. In each case, defendant sought to hide behind ERISA preemption, and argued that application of State law would require analyzing the propriety of their decision. And in each case, the court refused to preempt State law, even though plaintiff's claims would require a court "to determine whether defendant's communications were appropriate under the terms of" the ERISA plan, (Apx. 23a, Opinion (On Remand), p 5). In each case plaintiff was a non-ERISA entity, and imposition of State-law liability did not warrant preemption.

Congress's use of the vague phrase "relate to" has undeniably created complexity and uncertainty in determining whether ERISA preempts State-law claims brought by ERISA plan participants and others within ERISA's regulatory framework. See generally DiFelice v Aetna US Healthcare, 346 F3d 442, 453-467 (CA 3, 2003)(Becker, J, concurring)(ERISA preemption has become a "virtually impenetrable" shield insulating plan sponsors from meaningful liability for negligent or wrongful acts committed against plan beneficiaries; Congress should clarify

statutory language and end the "judicial snipe hunt" for a middle ground that applies statutory language without wholesale foreclosure of participants' causes of action against HMOs) (emphasis added). C.C. Mid West predicts that defendants will again try to manipulate that confusion to their advantage, and that any case they cite in their brief will deal with preemption of lawsuits brought by ERISA entities (participant, beneficiary or proxy), lawsuits seeking benefits from an ERISA plan, or both. But that is not this case – C. C. Mid West is not an ERISA entity, and seeks no ERISA benefit. Under Strehl, Grand Park Surgical Center, Inverness and other cases involving claims by a non-ERISA entity, against individuals who happen to have used as their weapon of choice an ERISA-governed plan, C.C. Mid West's claims cannot be deemed preempted. The Court of Appeals (On Remand) reversibly erred in holding otherwise.

II. Even Applying The ERISA Preemption Standards Used Where Plaintiff Is An ERISA Entity, Defendants Cannot Meet Their "Considerable Burden" of Showing That Congress's "Clear and Manifest Purpose" Was To Supplant Common-Law Tort Claims In This Historically State-Regulated Area.

A. Michigan's Common Law of Tortious Interference Does Not Have a "Connection With" ERISA.[5]

Post-Travelers, the U.S. Supreme Court has recognized that its "connection with" language can be as vague and unhelpful as the statutory "relates to" language. It cautions that in determining whether State law has a "connection with" an ERISA plan, the "uncritical literalism" of the sort engaged in by defendants, the trial court and the Court of Appeals offers "scant utility." Dillingham Construction, 519 US at 325; 117 S Ct at 838. Rather, courts must

[5] The Court of Appeals properly declined to analyze whether Michigan tortious-interference law "references" an ERISA plan, since it so clearly does not that defendants have not even pressed that argument. (Apx. 21a, Opinion (On Remand), p 3). A law "references" an ERISA plan only if it "acts immediately and exclusively upon ERISA plans...or where the existence of ERISA plans is essential to [its] operation..." Dillingham Construction, 117 S Ct at 837-38 (citations omitted). State common law of tortious interference does neither. See, Columbia Gas System, Inc v First National Bank of Boston, 182 BR 397, 401 (D Del, 1995).

look both to ERISA's objectives as a guide to the scope of State law that Congress understood would survive, and the nature of the State law's effect on ERISA plans. Id. Put another way, State law is preempted only where it either mandates certain employee benefit structures or their administration, or provides an "alternative enforcement mechanism" for ERISA benefits. Dishman, 269 F3d at 981-984 (citing Travelers and other cases). Under those preemption standards, C.C. Mid West's common-law tortious-interference claims do not have an impermissible connection with an ERISA Plan so as to be preempted.

Three factors are to be considered in determining whether State law has a sufficient "connection with" the Fund: 1) whether the State law represents a traditional exercise of State authority, 2) whether it affects relations among ERISA entities (employer, plan, plan fiduciaries, participants and beneficiaries) or between one of those entities and outsiders, and 3) the incidental nature of any effect of the State law on an ERISA plan. Firestone Tire & Rubber Co v Neusser, 810 F2d 550, 555-56 (CA 6, 1987). The second factor (whether Michigan tortious-interference law affects relations among ERISA entities, as opposed to dealings between an ERISA entity and an ERISA outsider) is discussed at length in Section I above, and cuts overwhelmingly in favor of C.C. Mid West, which is simply not an ERISA entity. As will be discussed here, the other two factors do, as well.

1. Exercise of a Traditional State Power

This factor also weighs heavily in C.C. Mid West's favor. Imposition of common-law tort liability undeniably is an area that historically has been left to the States, not to Federal law. Teper, 431 Mich at 218 & n 15 (citations omitted); see also Coyne & Delany, 98 F3d at 1467. The torts of tortious interference with contract and business expectancy were well-established throughout the nation at the time of ERISA's enactment in 1974. Michigan first recognized the

tort in 1895, and its essence has changed little from that applied in England in the 19th Century. Feldman v Green, 138 Mich App 360, 370-71 & n 1; 360 NW2d 881 (1985). There is absolutely no indication that Congress intended ERISA to preempt such common-law tort causes of action, especially where they do not seek to recover ERISA plan benefits. See Travelers, 514 US at 664-65; 115 S Ct at 1681 (New York statute imposing surcharges on some hospital rates not preempted; several States regulated hospital charges at time of ERISA's enactment and there is not even a hint that Congress intended to squelch those efforts); see also BPS Clinical Labs, supra, 217 Mich App at 696 (nothing in ERISA or its legislative history indicates that Congress chose to displace general health-care regulation, historically a local matter); Auslander v Helfand, 988 F Supp 576 (D Md, 1997) (Maryland law of waiver and release not preempted; no evidence that Congress intended to preempt); Teper, 431 Mich at 221-222 (award of future pension benefits under Michigan wrongful-discharge law not preempted); Scheuneman (On Rem), 243 Mich App at 215 (workers' compensation traditionally a State-regulated area; no preemption). Pension plans and their trustees and administrators existed prior to 1974, and State common-law tortious-interference law at that time was as applicable to them as to anyone else. Because there is no evidence that Congress intended to alter that framework in enacting § 1144(a), preemption cannot apply.

2. Incidental Effects of State Law on the Fund

Courts have been increasingly vigilant in refusing to apply preemption even against ERISA participants, where the participant brings a State common-law claim that impacts Plan administration only slightly. In Dishman the plaintiff – an individual who was receiving disability benefits from an ERISA-governed plan – brought a variety of ERISA claims against the Plan administrator after his benefits were "suspended" following a private investigation the

administrator had ordered; plaintiff also brought an invasion-of-privacy claim under California law relating to the private investigator's overly intrusive methods. The court found the State claim not preempted because California privacy law "by no stretch of the imagination" mandated certain employee benefit structures or their administration, and because holding plan administrators liable for the offensive conduct of their investigators "cannot be said to interfere with nationally uniform plan administration in the manner or to the extent" to warrant preemption. 269 F3d at 982. Though defendant argued (as defendants do here) that the claim must be preempted because the allegedly wrongful action grew directly out of its conduct as an ERISA fiduciary, the court rejected that assertion:

> This argument smacks of the "uncritical literalism" the Supreme Court has admonished us to eschew. Obviously, at some level Dishman's tort claim relates to the plan. That cannot be denied. But that cannot be the end of the analysis, either, for as we know, "pre-emption does not occur ... if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." [984 F3d at 839, citing Travelers, 514 US at 661].

Indeed, the arguments advanced by UNUM, the Plan administrator in Dishman, were identical to those asserted by defendants here: that imposition of State common-law tort liability would cripple its ability to manage its ERISA Plan, by subjecting it to meddlesome, contradictory standards that vary among States. But the Dishman court properly recognized that lines must be drawn somewhere – in this case, against preempting the State-law cause of action:

> The fact that the conduct at issue allegedly occurred "in the course of UNUM's administration of the plan" does not create a relationship sufficient to warrant preemption. If that were the case, a plan administrator could "investigate" a claim in all manner of tortious ways with impunity. What if one of UNUM's investigators had accidentally rear-ended Dishman's car while surveilling him? Would the fact that the surveillance was intended to shed light on his claim shield UNUM and the investigator from liability? What if UNUM had tapped Dishman's phone, put a tracer on his car, or trained a video camera into his bedroom in an effort to obtain information? Must that be tolerated simply

> because it is done purportedly in furtherance of plan administration? To ask the question is to answer it. [269 F3d at 984].

In a final rebuke to those who (like defendants here) cling slavishly to 1970s-era notions of ERISA preemption, the court explained why such claims are not preempted:

> Though there is clearly some relationship between the conduct alleged and the administration of the plan, it is not enough of a relationship to warrant preemption. We are certain that the objective of Congress in crafting Section 1144(a) was not to provide ERISA administrators with blanket immunity from garden variety torts which only peripherally impact daily plan administration. [Id].

Dishman vitiates defendants' attempt to hide behind ERISA preemption by claiming that they were simply "communicating with plan participants" while administering their pension plan. For even accepting that claim (which requires one to ignore C.C. Mid West's undisputed evidence that the owner-operators were under no circumstances eligible for the illusory "carrot" that defendants dangled before them), Dishman teaches that even where an ERISA administrator's misconduct arises directly from Plan administration, it may still be of a type that Congress simply did not intend to protect with blanket immunity from State common-law tort liability. Even in Dishman, where it was "obvious" that plaintiff's claims "at some level relate to" the ERISA plan, that connection was deemed too tenuous and remote to warrant preemption. The connection in this case is even more tenuous and remote, since C.C. Mid West is an ERISA outsider.

Under defendants' view, they could announce a lucrative new benefit for which all Teamsters' pension Fund participants would be eligible, provided that each participant agreed to vandalize businesses owned by members of a particular racial, ethnic or religious group, and be immune from State tort liability to the business owners for the resulting damage. In the course of administering their pension plan they could conceivably determine that "sound actuarial

practices" require that "contract hits" be taken out on all participants above a certain age, so as to safeguard the plan's solvency. In both cases, such outrageous conduct clearly would "relate to" Plan administration, but would defendants be shielded from State tort (not to mention criminal) liability? As in Dishman, to ask the question is to answer it. Indeed, in this case there is an added element not present in Dishman: C.C. Mid West has offered evidence that defendants were not acting in connection with Plan administration, but were using the Plan as a convenient stalking horse, to disguise their own personal animus-driven vendetta against the company.

The Sixth Circuit agrees that even purported Plan administration can involve conduct that is not exempted from State common-law liability by ERISA preemption. In Marks v Newcourt Credit Group, Inc, 342 F3d 444 (CA 6, 2003), plaintiff Marks was employed by AT&T Capital Corporation in a senior management position, and participated in an ERISA-governed severance Plan that entitled him to benefits if there was a change in control of the company and he suffered a "Qualifying Termination" as defined in the Plan. Defendant Newcourt purchased AT&T in early 1998 (a "change in control") and offered Marks continued employment under substantially similar terms and conditions, which he accepted, but he would have to make a claim for benefits by October 1, 1998 to be entitled to benefits in the event he suffered a Qualifying Termination.

During 1998 Newcourt allegedly began making changes to Marks's business unit; Marks sought and obtained assurances that they were not designed to reduce either his duties or his compensation, and he did not assert any rights under the Plan prior to October 1, 1998. In February 1999 Marks suffered a heart attack and took disability leave, and the next month he learned that his bonus was significantly below bonuses he typically received from AT&T. On June 1, 1999 he sought benefits under the Plan, arguing that he was constructively discharged. Plan administrators denied his claim, and Marks then sued, alleging that AT&T changed its

methods for calculating performance goals (and thus his bonus) prior to October 1, 1998, but did not make clear until May 1999 that the changes were intended to materially reduce his job duties. After his complaint was amended, Marks's lawsuit contained various State-law and ERISA-based claims, including claims for breach of contract/constructive discharge, fraud and silent fraud, innocent misrepresentation and fraudulent inducement.

The trial court granted Newcourt summary judgment on Marks' State-law claims for breach of contract, fraud and innocent misrepresentation, finding that they were preempted by ERISA because each claim relied "on plaintiff's allegations that defendants deceived him about his job responsibilities and duties, thus inducing him to accept employment with defendants, further inducing him to purchase Newcourt stock, and ultimately lulling him into not exercising his rights under the AT&T plan." 342 F3d at 452 (citing district court opinion). The 6th Circuit reversed, however, citing many of the same cases C.C. Mid West cites in this brief, in which courts repeatedly have held that State-law claims are not preempted to the extent they have only a "tenuous, remote or peripheral effect" on an ERISA plan, and reiterating that the focus should be "on the remedy sought by plaintiffs," Id, citing Lion's Volunteer Blind Indus, 195 F3d at 806. It then noted that even though Marks alleged that Newcourt had acted "solely for selfish reasons, namely, to avoid paying [him] more than $1.5 million that he would otherwise be entitled to under the AT&T Plan" – and therefore based his damage claim directly on the terms of the ERISA Plan – that alone did not justify preemption of his State-law claims:

> Because he seeks damages equaling the benefits he would have received under the plan, it seems at first glance that his claims relate to an ERISA benefit plan. However, a close reading of Marks's complaint reveals that the reference to plan benefits was only a way to articulate "specific, ascertainable damages." *Wright* [v *General Motors Corp*, 262 F3d 610, 615 (CA 6, 2001)].
>
> We conclude that the district court erred in finding that Marks's state-law claims were preempted to the extent that the claims alleged would have a

> "tenuous, remote or peripheral" effect on the plan. *Cromwell* [v *Equicor-Equitable HCA Corp*, 944 F2d at 1276. Marks alleges that, without cause, Newcourt significantly altered his duties and reduced his compensation. Because this conduct may constitute a breach of Marks's employment contract irrespective of the plan, the breach of contract claim is not preempted. [342 F3d at 453].

The court went on to hold that Marks's fraud and misrepresentation claims also were not entirely preempted, "even though they clearly relate to ERISA," to the extent that Marks alleged that Newcourt's fraud or misrepresentation induced him to accept employment in the first place.

Thus, in Marks the 6th Circuit resoundingly rejected the same preemption arguments advanced by defendants in this case. While defendants here claim that "C.C. Mid West is making a disguised claim for benefits" – a bald mischaracterization that even the Court of Appeals rejected – Marks clearly was making a claim for ERISA benefits, i.e. the $1.5 million he claimed he would have received under the Plan – and preemption still did not apply. And, while defendants here will argue that C.C. Mid West's allegation that they acted out of impermissible motives wholly unrelated to the Fund "necessarily requires an examination of how the ERISA plan has been administered," Marks not only alleged that Newcourt acted "solely for selfish reasons," but that that "selfish reason" was to avoid paying him the $1.5 million he would have obtained under the ERISA plan! That clearly is much more closely connected to ERISA Plan administration than any of the allegations at issue here, which in no way rely on the ERISA Plan to determine the extent of C.C. Mid West's damages.

Application of Michigan tortious-interference law under these facts will not present defendants with any conflict regarding their fiduciary duties, or expose them to "meddlesome" State oversight, beyond that which already exists. As defendants make their way each month from their various home States to Chicago for meetings of the Teamster pension Fund's board, they are under a duty not to drive drunk, not to carry a concealed weapon without a permit, and

not to violate every other State law of general application to which all of us are subject. Once at their meeting, like anyone else, they run the risk of being sued if their actions harm an outsider to the Fund. See Mackey, 486 US at 832-34; 108 S Ct at 2187 ("lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors or even torts committed by an ERISA plan...are relatively commonplace"); Dishman, 269 F3d at 984 (Congress did not intend to provide blanket immunity for garden-variety torts arising from ERISA plan administration); Willmar Electric Service v Cooke, 212 F3d 533, 538 (CA 10, 2000)(State law setting minimum supervision ratios for apprentice electricians not preempted; statute would not have impermissible economic effects on ERISA plans because all laws of general applicability inevitably affect plans in some way, and area is one of traditional State regulation). Long before the sea change in ERISA preemption ushered in by Travelers, this Court recognized that the imposition of an administrative burden on an ERISA plan by State law, is not enough to by itself trigger preemption. Teper, 431 Mich at 219 & n 16, citing Mackey (not every State law that imposes an administrative burden on an ERISA plan is preempted).

Here, the impact on the Teamsters' pension fund will be nil, not even "tenuous and remote." The Fund is not a party to this action. See Teper, 431 Mich at 221-222 (award of future pension benefits against the employer, not pension plan, does not "relate to" pension plan, and State wrongful-discharge suit not preempted). Defendants may continue to decide whether or not to allow certain individuals to self-pay in instances where they have discretion to do so, and may continue to communicate their decisions. They may even continue to seethe among themselves at the existence of trucking companies that are not organized by the Teamsters' union. They are barred only from maliciously seeking to harm non-ERISA entities: whether by unlawfully threatening pension-plan participants with denial of a valuable benefit for which they

know participants are ineligible anyway, in order to coerce them into refusing to deal with the third party, or by less subtle methods, i.e. a rock through the windshield. It is no different from barring them from making racially discriminatory decisions, or conspiring to commit crimes.

Indeed, even where a State law is asserted against an ERISA entity by another ERISA entity, the claim is not preempted if it has only a *de minimis* effect on plan administration. "Slayer" statutes constrain plan administration by barring payment of insurance proceeds to a plan beneficiary who murders a participant. Yet those statutes remained applicable even during ERISA preemption's pre-1995 heyday. See Emard v Hughes Aircraft Co, 153 F3d 949, 959-60, n 11 (CA 9, 1998) (citing cases). The fraud laws of each State prevent defendants from paying insurance proceeds from the Teamsters' pension Fund to a beneficiary who obtains that designation through fraud, since "Congress could not have intended that ERISA displace state law in such instances." 153 F3d at 960. These results obtain even though fraud law and slayer statutes vary among States, since the burden they impose "is too slight to overcome the presumption against pre-emption..." Id, *citing* DeBuono.[6]

B. Nothing in ERISA's Legislative History Suggests That Congress Intended To Vitiate The States' Longstanding Authority Over Common-Law Tort Liability.

This Court repeatedly has made plain that clear statutory language should be applied as written, and absent statutory ambiguity, legislative history is of minimal use in construing a

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[6] Though the U.S. Supreme Court in Egelhoff v Egelhoff, 532 US 141; 121 S Ct 1322; 149 L Ed 2d 264 (2001), held preempted the types of State community-property statutes at issue in Emard, since they directly referenced "employee benefit plan[s]" and forced ERISA Plan fiduciaries to ignore Plan documents and instead pay Plan benefits to someone else in the event of divorce, it expressly acknowledged that its decision should not be read to preempt areas of State regulation such as "slayer" statutes, in part because those laws have a "long historical pedigree predating ERISA," and are largely uniform nationwide, 532 US at 152. If anything, the common law of tortious interference has an even longer "historical pedigree" than slayer statutes, and varies little among the States.

statute. In re Certified Question (Henes v Continental Biomass Indus, Inc), 468 Mich 109; 659 NW2d 597 (2003). Nevertheless, the Court has also recognized that in analyzing whether a Federal statute preempts State law, Congressional intent can be "pivotal," and in determining that intent the Court should look to not only the statutory text but to the structure and purpose of the statute as a whole, including the way in which Congress intended the statute to affect consumers, business and the law. Ryan v Brunswick Corp, 454 Mich 20; 557 NW2d 541 (1997).[7] Indeed, "Congressional intent is the cornerstone of preemption analysis." Id at 27. This is especially so because Federal provisions that invalidate State law are to be narrowly construed to support a presumption against preemption of State law, and State police powers are not to be superseded unless that was Congress's clear and manifest intent. Id. Because this case involves precisely such interplay between Federal and State law, and because ERISA's use of the phrase "relate to" is hardly clear and unambiguous, but rather has been labeled so vague as to provide "an illusory test [for preemption], unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended," Dillingham Construction, 519 US at 335-336; 117 S Ct at 843 (Scalia, J., concurring), ERISA's legislative history should be consulted. Simply put, that history is so scant that it cannot possibly meet defendants' heavy burden of showing a Congressional intent to preempt these claims. If anything, it supports C.C. Mid West – because it shows that Congress in enacting ERISA sought to protect plan participants, not to immunize from tort liability individuals who happen to be plan trustees and administrators, and who wage economic warfare against non-ERISA entities for their own personal reasons.

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[7] Ryan's substantive holding – that State common-law claims against a boat manufacturer arising out of a boating fatality were preempted by the Federal Boat Safety Act – was ultimately overruled by the U.S. Supreme Court in Sprietsma v Mercury Marine, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002). But that reversal did not affect Ryan's general statements regarding the use of Congressional intent in determining whether a Federal statute preempts a State common-law cause of action.

As courts and commentators have noted, Congress simply "did not carefully consider the scope of preemption when it drafted ERISA." DiFelice, 346 F3d at 467, citing Fisk, The Last Article About the Language of ERISA Preemption?, 33 Harv J on Legis 35, 53 (1996). The House-Senate Conference Committee took differing versions of the statutory language that emerged from each body, and ultimately came up with a third version – the one enacted – that it made available to the full Congress only 10 days before the bill was enacted, and with little comment regarding it. 346 F3d at 467, citing 120 Cong Rec 4742 (1974)(HR 2) and 120 Cong Rec 5002 (1974)(S 4200); also Metropolitan Life Ins Co v Massachusetts, 471 US 724, 745 & n 23; 105 S Ct 2380; 85 L Ed 2d 728 (1985). As the DiFelice concurrence noted:

> There is scant reason to believe that the resulting language was fully considered by the entire deliberative body; indeed, those who paid attention to the issue opined that § 514(a) was provisional. Section 3022 mandated the creation of a Joint Pension Task Force to study the practical effect and desirability of preemption, and Senator Jacob Javits, a sponsor of the legislation, said that "the desirability of further regulation – at either the State or Federal level – undoubtedly warrants further attention." 120 Cong Rec 29,942 (1974)(remarks of Sen. Javits). Unfortunately, the Task Force never came into existence, and no further regulation was forthcoming.... [346 F3d at 467, citing Fisk, 33 Harv J on Legis at 56].

To the extent that anything can be gleaned from the legislative history, it supports C.C. Mid West. As indicated by the remarks of Sen. Williams, Chair of the Senate Labor Committee, the preemption provision that emerged from the House-Senate conference committee was

> ...intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to imply in its broadest sense to all actions of State or local governments or any instrumentality thereof, which have the force or effect of law. [93rd Cong (2d Sess), 1974 US Code Cong & Admin News 5188-5189 (Sen. Williams)].

While early ERISA preemption cases emphasized the latter part of that statement – construing preemption "in its broadest sense" – current case law more appropriately focuses on

the central aim intended by Congress, "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." See Dishman, 269 F3d at 981, citing Ingersoll-Rand v McClendon, 498 US 133, 142; 111 S Ct 478; 112 L Ed 2d 474 (1990). "The basic thrust of the preemption clause...was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." 269 F3d at 981, quoting Travelers, 514 US at 657; 115 S Ct at 1671; see also Rush Prudential HMO, Inc v Moran, 536 US 355, 392; 122 S Ct 2151, 2173; 153 L Ed 2d 375 (2001)(Thomas, J., dissenting)(citing Ingersoll-Rand and Egelhoff). Indeed, this Court recognized that as far back as 1988, when it noted in Teper that while Congress's purpose was to encourage development of employee benefit plans, its chosen method "was not a direct requirement that employers provide certain benefits...but the creation of a uniform national body of law regulating such plans." 431 Mich at 214-215, citing Shaw, 463 US at 91, 99, and 120 Cong Rec 29197, 29933. Imposition of Michigan common-law liability for tortious interference does not expose defendants to any threat of conflicting or inconsistent State regulation – indeed, they have never even attempted to argue that there is any difference in tortious-interference law among the 50 States that would subject ERISA plan administrators to conflicting or inconsistent regulation. The national-uniformity rationale for ERISA preemption is not implicated by the facts of this case.

In its explanation of "Reasons for the Bill," the report of the Senate Finance Committee listed several "problem areas" to be addressed, including inadequate coverage by retirement plans, discrimination against the self-employed and employees not covered by retirement plans, inadequate vesting and funding, loss of pension benefits due to plan terminations and misuse of pension funds and disclosure of pension operations. [93rd Cong (2d Sess), 1974 US Code Cong & Admin News, pp 4898-4903 (Senate Finance Committee Report No. 93-383)]. Conspicuously

absent from the list of "problem areas," though, was anything even remotely approaching the issue of interference with plan administration by non-ERISA entities asserting State common-law tort claims. Congress enacted ERISA preemption to relieve employers and ERISA plans from the burdens of complying with conflicting State laws "not as an end in and of itself, but rather as a means to promote the principal object of ERISA as a whole – 'to protect plan participants and beneficiaries.'" Andrews-Clarke v Travelers Ins Co, 984 F Supp 49, 58 & n 44 (D Mass, 1997) (citations omitted); *see also*, BPS Clinical Laboratories, supra, 217 Mich App at 697; Morstein v National Insurance Svcs, Inc, 93 F3d 715, 723-24 (CA 11, 1996 *en banc*), *cert denied sub nom*, Shaw Agency v Morstein, 519 US 1092; 117 S Ct 769; 136 L Ed 2d 715 (1997) (citation omitted); 29 USC 1001(b). Given that Congress in enacting ERISA primarily was concerned with protecting ERISA Plan participants – and decided to preempt State-law claims as a means toward that end, and not the end of giving blanket immunity to Plan trustees – it is hard to imagine an act more antithetical to that purpose than permitting individuals to maliciously harm a third party, in furtherance of their own private vendettas, by intimidating Plan participants into backing out of contracts with that third party via false statements about illusory benefits. ERISA preemption does not exist to provide plan trustees and administrators with a place to cry "sanctuary" from tort liability to non-ERISA parties, but rather to foster ERISA's ultimate end of protecting the lot of participants and beneficiaries. Preemption of State tort law here would be repugnant to ERISA's goals.

As the U.S. Supreme Court noted in Dillingham Construction, in refusing to find preempted the California prevailing wage statute, that statute:

> ...alters the incentives, but does not dictate the choices, facing ERISA plans. In this regard, it is "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." Travelers, 514 US at 668, 115 S Ct at 1683. We could not hold

> preempted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort. [519 US at 334; 117 S Ct at 842]

Unfortunately, the Court of Appeals's overly broad view of ERISA preemption here does "grave violence" to traditional notions of Federalism and the historically State-regulated realm of common-law tort liability. There is no evidence that Congress intended to give ERISA plan overseers *carte blanche* to violate any and all State laws with impunity. Quoting from the Supreme Court's ruling in Pegram v Herdrich, 530 US 211, 226; 120 S Ct 2143; 147 L Ed 2d 164 (2000), the Fourth Circuit in Darcangelo said that its "doubt" that Congress "intended the category of fiduciary administrative functions to encompass tortious conduct by a plan administrator that is completely unrelated to its duties" under an ERISA plan, "hardens into conviction" when it considers the consequences that would flow from adopting that position:

> Under the defendants' view, ERISA administrators would enjoy blanket immunity – at least from damages under state tort law – for any manner of wrongful conduct aimed at plan participants and beneficiaries, regardless of how unrelated that conduct is to the ERISA plan. We cannot imagine that Congress would have wanted such a result. As our court has explained, state common law torts such as invasion of privacy and negligence are traditional areas of state authority, and federalism concerns strongly counsel against imputing to Congress an intent to preempt large swaths of state law absent some clearly expressed direction.....[292 F3d at 193-94 (emphasis added) (internal quotes, brackets and citations omitted)].

Long before the sweeping curtailment of ERISA preemption signaled by Travelers, this Court in Teper correctly recognized that the bedrock principles of federalism underlying our system of government necessarily check and constrain ERISA's preemptive reach. Rejecting the argument that ERISA preempted part of the damage claim sought by plaintiff in a common-law wrongful-discharge dispute – an area of historic State regulation – this Court noted:

> We reject an all-encompassing view of this legislation which would subordinate the sovereign powers of this state to the limited authority of the federal government. As the United States Supreme Court has explained:

> ERISA preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." [431 Mich at 220-221, quoting Alessi v Raybestos-Manhattan, Inc, 451 US 504, 522; 101 S Ct 1895; 68 L Ed 2d 402 (1981) and Ft Halifax Packing Co, 482 US 19].

ERISA preemption must not be used to trample so blithely on longstanding principles of federalism. It is not, nor can it be, some sort of "free pass" allowing people who happen to be trustees and administrators of a pension plan to evade liability for tortious conduct aimed at non-ERISA entities. In any event, defendants can offer no evidence showing that that is what Congress intended it to be. Wherever the outer limits of ERISA preemption are – and the boundary is currently contracting – the position staked out by defendants and by the Court of Appeals in its Opinion (On Remand) most certainly is beyond it.[8]

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[8] Justice Scalia's suggested approach of scrapping the extant body of ERISA preemption case law in favor of ordinary "conflict" and "field" preemption analysis, Dillingham Construction, 519 US at 336 (Scalia, J., concurring), Egelhoff, 532 US at 152-153 (Scalia, J., concurring), would similarly result in reinstatement of C.C. Mid West's claims. None of the four factors this Court examines in determining whether Federal law "occupies the field," People v Llewellyn, 401 Mich 314, 322; 257 NW2d 902 (1977), are implicated by State common-law tort claims brought by non-ERISA entities: ERISA does not expressly grant exclusive (or even any) Federal authority over such claims; its legislative history does not support such a grant; ERISA in no way establishes a "pervasive regulatory scheme" over such claims; and allowing State tort claims by non-ERISA entities does not threaten the uniformity of standards that ERISA preemption is meant to promote.

Nor does Michigan tortious-interference law stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," which is the test for "conflict preemption." Attorney General v Consumers Power Co (On Reh), 202 Mich App 74, 80; 508 NW2d 901 (1993), citing English v General Electric Co, 496 US 72, 79; 110 S Ct 2270; 110 L Ed 2d 65 (1990). As noted above, "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are "relatively commonplace" and not preempted, even though they obviously affect and involve ERISA plans and their trustees. Mackey, 486 US at 833 (emphasis added). Michigan tortious-interference law is simply another example of such "run-of-the-mill" claims, and does not threaten national uniformity since defendants have not shown any distinction between Michigan's version of this tort, and that of the other States. (Nor can it be said that "a private party cannot possibly comply with both state and federal requirements," Wayne Co Bd of Comm v Wayne Co Airport Auth, 253 Mich App 144, 198; 658 NW2d 804 (2002), citing English, 496 US 72, 78-79: ERISA did not force defendants to threaten the owner-operators with the illusory

C. The Court of Appeals Erred In Disregarding C.C. Mid West's Unrebutted Evidence That Defendants' Threats Did Not Involve Plan Administration.

Lest this Court fear that allowing C.C. Mid West's claims to go forward would "open the floodgates" to State tort liability for administrators who undertake Plan-related activities, the undisputed evidence that C.C. Mid West submitted below should put that concern to rest. By the admission of the Teamster Fund's general counsel, there was no ERISA-related decision for defendants to make, and they knew it. The Fund's general counsel, in deposition testimony given in another lawsuit and obtained by C.C. Mid West through informal discovery, admitted knowing at the time that both IRS regulations and the Fund's own rules precluded the owner-operators from self-paying into the Fund after their termination by Central Transport, regardless of whether they worked for a CenTra affiliate or anyone else. While Plan documents permit individuals who have been laid off to self-pay, under the terms of the Termination Agreement negotiated by Central Transport and the International Brotherhood of Teamsters – an agreement which gave the drivers 60 days' notice and severance payments totaling $4.6 million – the drivers were terminated by Central Transport, not laid off. (Apx. 83a-84a, Nyhan testimony) (under IRS regulations and Fund rules, terminated employees could not self-pay); Apx. 55a, Central Transport Termination Agreement ("...owner/operators of Central will be terminated"). Moreover, defendants were aware of this in April 1997, prior to both the letter and the Ft. Wayne meeting. (Apx. 86a-88a, Nyhan Deposition; Apx. 75a-76a, 5/7/97 Letter). Though they knew that the drivers would not have been eligible to self-pay under any set of circumstances, their commercial and ideological animus toward C.C. Mid West and CenTra was (and is) such that they held out the fictitious "carrot" of self-payment if the owner-operators would only drive for

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promise of a benefit that they were not entitled to anyway; and indeed such conduct likely violated ERISA, as well as Michigan common law – though any such claims would be for the owner-operators or the Secretary of Labor to bring, and are not part of this action).

someone else: anyone else but C.C. Mid West. Defendants' characterization of their statements as "communications with participants about benefits" thus is nothing but a ruse; the Teamsters' pension Fund here was (and is) merely a stalking horse for defendants' tortious scheme to destroy C.C. Mid West due to its non-union status.

Moreover, the Court of Appeals fundamentally erred in its decision to credit the defendants' proffered explanations, since those explanations were never offered via any evidence and were indeed contradicted by the evidence that C.C. Mid West offered. In reviewing a motion for summary disposition based on lack of subject-matter jurisdiction under MCR 2.116(C)(4), the court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits or other proofs show that there was no genuine issue of material fact. Walker, 217 Mich App at 708. But only C.C. Mid West has filed a pleading – defendants have never answered the Complaint – and only C.C. Mid West has offered evidence, the papers it submitted in connection with its motion for reconsideration.

The court's erroneous crediting of defendants' unsworn claims led directly to the fundamental error in its ruling:

> Here, because resolution of plaintiff's claims requires the court to determine whether defendant's communications were appropriate under the terms of the fund, the court must go beyond a "cursory examination" of the plan's provisions and interpret its terms....Although plaintiff's claims are not intimately tied to "core concerns of the ERISA legislation, the plan and the communications giving rise to the tortious interference claim appear inseparable." Fairneny v Savrogran Co, 422 Mass 469, 476; 644 NE2d 5 (1996)(Apx. 23a, Opinion (On Remand), p 5) (internal brackets and ellipses omitted).

Had the Court of Appeals properly considered C.C. Mid West's Complaint allegations and its (unrefuted) evidence, it could only have come to the opposite conclusion: that C.C. Mid West alleges not "faulty plan administration," but rather "improper conduct so unrelated to the plan that it cannot be termed 'plan administration' of any sort," and thus its claims are not

preempted. Darcengelo, 292 F3d at 193 (Apx. 113a). C.C. Mid West presented evidence that the defendants knew at the time they made their threats that the owner-operators could not self-pay under any circumstances. Instead of considering that evidence, though, the Court of Appeals simply relied on the "finding" it made in its first (now-vacated) opinion – a finding that itself was based on nothing more than defendants' unsworn briefs. (Apx. 23a, Opinion (On Remand), p 5)("As we did in our first opinion, we again conclude that defendants' actions were undertaken as fiduciaries of the Pension Fund"). This flatly violates the standards for resolving a motion under MCR 2.116(C)(4). At a minimum, a genuine factual issue exists over the degree to which the communications were related to Plan administration, so as to make summary disposition under MCR 2.116(C)(4) inappropriate.

Again, the Sixth Circuit's recent decision in Marks is illuminating. Even if C.C. Mid West's claims required some oblique, peripheral analysis of the Fund in order to determine that defendants' motives were wholly unrelated to it – which is not the case, since C.C. Mid West has offered undisputed evidence that defendants acted for selfish reasons wholly unrelated to the Fund, and that the Fund was merely the weapon of convenience closest at hand – nothing could more directly require an examination of the ERISA plan than the "selfish reason" that Marks alleged, non-payment of benefits in the amount set by the Plan. Yet Marks's claims were held not to be preempted, and properly so.

D. The Court of Appeals' Opinion (On Remand) Cites an ERISA Preemption Standard That Requires Reversal of Its Own Conclusion.

The Court of Appeals' Opinion (On Remand) contains a glaring internal contradiction that on its own requires reversal. The Opinion correctly states that "[i]t is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit," (Apx. 22a, Opinion (On Remand) at 4)(emphasis

added) citing MacKay, 993 F Supp at 1070 and Cromwell, 944 F2d at 1276. In the very next paragraph, it also correctly notes that C.C. Mid West does not seek ERISA Plan benefits. Id ("Defendants also claim that plaintiff merely disputes a benefits determination that defendants made that allegedly caused harm to the plan participants and that plaintiff is actually making a claim for benefits on behalf of the drivers. We are compelled to disagree with defendants' characterization of plaintiff's claims"). However, the court's ultimate holding is that Michigan law is preempted in this instance. Had the Court of Appeals followed the very authority it cites – MacKay and Cromwell – and applied that to its own correct factual finding that C.C. Mid West does not seek plan benefits, its ruling should have been precisely the opposite of what it was.

E. The Court of Appeals Failed In Its Attempt to Distinguish This Case From Darcangelo v Verizon Communications and Other Recent Decisions Applying Current ERISA Preemption Analysis.

The Court of Appeals' Opinion (On Remand)(Apx. 23a-24a, Opinion at 5-6) tried to distinguish Darcangelo from this case, but failed. To the extent that the two are in any way distinguishable, this case is even less appropriate for preemption. In Darcangelo plaintiff sued her employer, Verizon, and the administrator of its ERISA-governed disability plan, CORE, for various State-law tort and statutory claims, as well as breach of contract. Plaintiff alleged that CORE improperly disseminated her private medical information to Verizon to help Verizon establish that she was a "direct threat" to her co-workers, so she could be fired without violating the Americans with Disabilities Act. 292 F3d at 187-88. CORE argued that the claims were preempted for the precise reason cited by defendants in this case: because the allegations went to the heart of its ERISA fiduciary duties to handle medical and mental-health information obtained in its capacity of administering Verizon's employee welfare plans, 292 F3d at 188. The district

court agreed and found plaintiff's four common-law tort and statutory claims preempted by ERISA, but the 4th Circuit reversed, after a lengthy analysis that bears repeating in detail.

The court first brushed aside CORE's protest – identical to that voiced by defendants here – that plaintiff's claims were preempted because the allegations arose directly out of CORE's administration of the ERISA plan. The court noted that the motion to dismiss was filed at the outset of the proceedings, before discovery or factual development had taken place:

> Here, it is not apparent from Darcangelo's complaint that the conduct charged had anything to do with administering the employee benefits plan. Indeed, Darcangelo alleges that CORE's solicitation of her medical information from third parties was not justified by any purpose that would result in legitimate use of the information. This allegation suggests that CORE did not seek the information in the course of providing benefits to Darcangelo or performing *any* of its duties under the ERISA plan.
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> * * *
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> ...the complaint, as we read it, makes factual allegations that CORE obtained her medical information solely for inappropriate ends. Because the case got no further than the motion to dismiss stage, the question for us is simply whether Darcangelo's claims based on these factual allegations are preempted by ERISA. [292 F3d at 189 (italics in original)(underline added) (Apx. 109a)].

Similarly, C.C. Mid West's complaint pleads that defendants' conduct had no lawful connection with legitimate Plan purposes, but was undertaken for the unjustified purpose of injuring C.C. Mid West. (Apx. 67a, 69a-70a, Compl, ¶¶ 34-40, 50-56). (Though C.C. Mid West did submit to the trial court materials it had obtained through its own informal discovery, C.C. Mid West has not yet been allowed to engage in any meaningful discovery in this case, and indeed, defendants to date have never filed an Answer to the Complaint).

The Darcangelo court then noted that under current preemption analysis (post-Travelers), the Supreme Court has found preemption appropriate in only three basic categories of State law:

> (1) laws that mandate employee benefit structures or their administration, (2) laws that bind employers or plan administrators to particular choices or preclude uniform administrative practices, and (3) laws that provide an alternative enforcement mechanisms to ERISA's civil-enforcement provisions. [292 F3d at

190, citing Travelers, 514 US at 658-59, 115 S Ct at 1671 and Coyne & Delany, supra, 98 F3d at 1468 (Apx. 110a)].

Calling the three categories "a guide for determining whether a particular state law relates to an ERISA plan," Id, the court analyzed plaintiff's claims under each. Plaintiff's common-law and statutory claims were not based on State laws that "mandate employee benefit structures or their administration," since none dictate the terms of a plan or the type of benefits it may provide, or impose reporting, disclosure or funding requirements, or affect benefit calculations. Id, citing Coyne & Delany, 98 F3d at 1471. As to the second category, plaintiff's claims were not based on any State law that would bind the plan administrator to particular choices:

> Because she alleges conduct that is entirely outside the scope of plan administration, she does not make any claim for relief that would regulate the structure or process of plan administration. She does not, for example, seek relief that would dictate how a plan administrator must process benefit information, dictate who may have access to such information, or limit the ability of the plan administrator to investigate benefits. [Id (Apx. 110a].

Finally, the court noted that the State common-law tort and statutory bases for plaintiff's action did not constitute alternative enforcement mechanisms for claims that are actually ERISA claims. 292 F3d at 190-94 (Apx. 110a-114a).

The same analysis mandates a finding that C.C. Mid West's claims are not preempted. Michigan tortious-interference law, like the Maryland laws at issue in Darcangelo, neither dictates the terms of the Plan nor the benefits it may provide, nor does it impose reporting, disclosure or funding requirements. Nor does Michigan tortious-interference law bind Plan administrators to a particular choice: as in Darcangelo, C.C. Mid West's Complaint "alleges conduct that is entirely outside the scope of plan administration," i.e. advancement of defendants' personal interests, at the expense of C.C. Mid West. Finally, with regard to the third category of preemption cases, it has already been settled that C.C. Mid West's claims are not

disguised ERISA claims: as Judge Rosen noted in rejecting defendants' interpretation of ERISA preemption for removal purposes, C.C. Mid West is not among the ERISA entities and cannot possibly bring an ERISA claim. 990 F Supp at 920-21 (Apx. 95a-96a).

The Court of Appeals tried to distinguish Darcangelo by claiming that there, plaintiff alleged "improper conduct so unrelated to the plan that it cannot be termed 'plan administration' of any sort," while C.C. Mid West alleges that "defendants committed torts in tandem with performance of their fiduciary duties." (Apx. 23a, Opinion (On Remand), p 5). This attempted distinction is flatly wrong on the facts. C.C. Mid West's complaint alleges clearly that "[d]efendants' wrongful conduct has no lawful connection with the purpose of the Pension Fund," (Apx. 67a, 69a-70a, Compl, ¶¶ 39, 55), and thus had nothing to do with any fiduciary duties. Indeed, the nature of the allegations here are strikingly similar to those in Darcangelo. As in this case, the defendant in Darcangelo accused the plaintiff of seeking redress against it for its improper performance of a traditional fiduciary function, or negligent discharge of its duties under ERISA. But the 4th Circuit in Darcangelo saw beyond that charge:

> Rather, Darcangelo alleges conduct by CORE that is completely unauthorized – conduct that was not undertaken in the course of carrying out its plan responsibilities. The complaint, in other words, does not simply allege "faulty plan administration," *Coyne & Delany*, 98 F3d at 1471; rather, it alleges improper conduct so unrelated to the plan that it cannot be termed "plan administration" of any sort. If, as Darcangelo alleges, CORE obtained her private medical information solely at the behest of Verizon to assist Verizon in its attempt to find a reason to discharge her, CORE was not acting in the course of making a benefits determination or performing any other plan function. The clear implication of these allegations is that CORE was not performing a fiduciary function, but was simply behaving as a rogue administrator, acting entirely outside of the scope of its duties under the plan. [292 F3d at 193 (emphasis added) (Apx. 113a)].

The same analysis applies here. C.C. Mid West alleges that defendants made their threats for reasons wholly unrelated to the Fund, as "rogue administrator[s], acting entirely outside the scope of [their] duties under the plan." 292 F3d at 193. Each defendant is either a union official

or a representative of a rival trucking company – the former group harbors animus toward C.C. Mid West and its corporate parent for ideological reasons, the latter for competitive commercial reasons. The complaint alleges that together they acted on their animus in an effort to cripple and destroy C.C. Mid West. (Apx. 67a, 69a-70a, Compl, ¶¶ 39-40, 55-56). Like the conduct alleged in Darcangelo, C.C. Mid West alleges improper conduct "so unrelated to the plan that it cannot be termed 'plan administration' of any sort," 292 F3d at 193 (emphasis added), and the Court of Appeals was simply incorrect in stating to the contrary. C.C. Mid West's claims are not preempted by ERISA. See also, Trustees of the Aftra Health Fund v Biondi, 303 F3d 765 (CA 7, 2002)(applying same three-category test from Travelers as Darcangelo, common-law fraud claim brought against ERISA plan participant who fraudulently misrepresented marital status in order to collect benefits under plan, held not preempted). If anything, the overwhelming trend in recent caselaw shows that preemption is even less appropriate here than it would have been in Darcangelo, since Ms. Darcangelo was an ERISA entity as both an employee and plan participant, and C.C. Mid West is neither.

CONCLUSION/RELIEF REQUESTED

The imposition of common-law tort liability for interference with contractual relations and business expectancies is historically an area of State regulation. Defendants have not met their "considerable burden" of showing that Congress's "clear and manifest purpose" in enacting ERISA was to preempt State common law in that area – especially when the plaintiff is a non-ERISA entity like C.C. Mid West, which seeks no relief from an ERISA Plan and which otherwise will be completely barred from any redress for defendants' wrongdoing. The Court of Appeals on remand erred in holding otherwise.

Plaintiff C.C. Mid West requests that the Court reverse the Court of Appeals's January 17, 2003 Opinion (On Remand) affirming the trial court's grant of summary disposition in favor of defendants, and send this matter back to the Oakland County Circuit Court for defendants to answer the Complaint, and for discovery and trial.

Respectfully submitted,

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Dated: January 5, 2004

(4) The research, surveys, studies, and publications referred to in this subsection may be conducted directly, or indirectly through grant or contract arrangements.

(b) Omitted

(c) Cooperation with Congress

The Secretary is authorized and directed to cooperate with the Congress and its appropriate committees, subcommittees, and staff in supplying data and any other information, and personnel and services, required by the Congress in any study, examination, or report by the Congress relating to pension benefit plans established or maintained by States or their political subdivisions.

(Pub.L. 93–406, Title I, § 513, Sept. 2, 1974, 88 Stat. 896.)

HISTORICAL AND STATUTORY NOTES

References in Text

This chapter, referred to in subsec. (a)(1), was in the original "this Act", meaning Pub.L. 93–406, known as the Employee Retirement Income Security Act of 1974. Titles I, III, and IV of such Act are classified principally to this chapter. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 1001 of this title and Tables.

This subchapter, referred to in subsecs. (a)(2), (3), and (b), was in the original "this title", meaning Title I of Pub.L. 93–406, which enacted this subchapter and amended section 5108 of Title 5, Government Organization and Employees, and sections 664, 1027 and 1954 of Title 18, Crimes and Criminal Procedure. For complete classification of Title I of Pub.L. 93–406, see Tables.

Codifications

Subsec. (b) of this section, which required the Secretary to submit annually a report to Congress on the administration of this subchapter, terminated, effective May 15, 2000, pursuant to section 3003 of Pub.L. 1040966, as amended, set out as a note under 31 U.S.C.A. § 1113. See, also, page 123 of House Document No. 103–7.

Promulgation of Regulations

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this subchapter call for the promulgation of regulations, see section 1031 of this title.

§ 1143a. Studies by Comptroller General

(1) In general

The Comptroller General of the United States may, pursuant to the request of any Member of Congress, study employee benefit plans, including the effects of such plans on employees, participants, and their beneficiaries.

(2) Access to books, documents, etc.

For the purpose of conducting studies under this section, the Comptroller General, or any of his duly authorized representatives, shall have access to and the right to examine and copy any books, documents, papers, records, or other recorded information—

(A) within the possession or control of the administrator, sponsor, or employer of and persons providing services to any employee benefit plan, and

(B) which the Comptroller General or his representative finds, in his own judgment, pertinent to such study.

The Comptroller General shall not disclose the identity of any individual or employer in making any information obtained under this section available to the public.

(3) Definitions

For purposes of this section, the terms "employee benefit plan", "participant", "administrator", "beneficiary", "plan sponsor", "employee", and "employer" are defined in section 1002 of this title.

(4) Effective date

The preceding provisions of this section shall be effective on April 7, 1986.

(Pub.L. 99–272, Title XI, § 11016(d), Apr. 7, 1986, 100 Stat. 275.)

HISTORICAL AND STATUTORY NOTES

Codifications

Section was not enacted as part of Pub.L. 93–406, The Employee Retirement Income Security Act of 1974, which enacted this chapter, but as part of Pub.L. 99–272, the Consolidated Omnibus Budget Reconciliation Act of 1985.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan,

shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. §§ 393–1 through 393–51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action—

(A) with respect to which the State exercises its acquired rights under section 1169(b)(3) of this title with respect to a group health plan (as defined in section 1167(1) of this title), or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 1191 of this title.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

(Pub.L. 93–406, Title I, § 514, Sept. 2, 1974, 88 Stat. 897; Pub.L. 97–473, Title III, §§ 301(a), 302(b), Jan. 14, 1983, 96 Stat. 2611, 2613; Pub.L. 98–397, Title I, § 104(b), Aug. 23, 1984, 98 Stat. 1436; Pub.L. 99–272, Title IX, § 9503(d)(1), Apr. 7, 1986, 100 Stat. 207; Pub.L. 101–239, Title VII, § 7894(f)(2)(A), (3)(A), Dec. 19, 1989, 103 Stat. 2450, 2451; Pub.L. 103–66, Title IV, § 4301(c)(4), Aug. 10, 1993, 107 Stat. 377; Pub.L. 104–191, Title I, § 101(f)(1), Aug. 21, 1996, 110 Stat. 1953; Pub.L. 104–204, Title VI, § 603(b)(3)(G), Sept. 26, 1996, 110 Stat. 2938; Pub.L. 105–200, Title IV, § 401(h)(2)(A)(i), (ii), July 16, 1998, 112 Stat. 668.)

HISTORICAL AND STATUTORY NOTES

References in Text

This subchapter, referred to in subsecs. (a), (b)(2)(A), (6)(A)(ii), (B), (C), (c)(2), and (d), was in the original "this title", meaning Title I of Pub.L. 93–406, which enacted this subchapter and amended section 5108 of Title 5, Government Organization and Employees, and sections 664, 1027 and 1954 of Title 18, Crimes and Criminal Procedure. For complete classification of Title I of Pub.L. 93–406, see Tables.

Subchapter III of this chapter, referred to in subsec. (a), was in the original "title IV of this Act", meaning Title IV of Pub.L. 93–406, which enacted subchapter III (section 1301 et seq.) of this chapter, and amended section 5108 of Title 5, Government Organization and Employees, sections 404 and 6511 of Title 26, Internal Revenue Code, and former section 846 of Title 31, Money and Finance. For complete classification of Title IV of Pub.L. 93–406 to the Code, see Tables.

The Social Security Act, referred to in subsec. (b)(8)(B), is Act Aug. 14, 1935, c. 531, 49 Stat. 620, as amended. Title XIX of the Social Security Act is classified generally to subchapter XIX (section 1396 et seq.) of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

Effective and Applicability Provisions

1998 Acts. Section 401(h)(2)(C) of Pub.L. 105–200 provided that: "The amendments made by subparagraph (A) [amending this section and section 1169 of this title] shall be effective as if included in the enactment of section 4301(c)(4)(A) of the Omnibus Budget Reconciliation Act of 1993 [Pub.L. 103–66, Title IV, § 4301(c)(4)(A), Aug. 10, 1993, 107 Stat. 377, which amended this section]."

1996 Acts. Amendment by Pub.L. 104–204 applicable with respect to group health plans for plan years beginning on or after Jan. 1, 1998, see section 603(c) of Pub.L. 104–204, set out as a note under section 1003 of this title.

Amendment by section 101 of Pub.L. 104–191 to apply with respect to group health plans for plan years beginning after June 30, 1997, except as otherwise provided in section 101 of Pub.L. 104–191, see section 101(g) of Pub.L. 104–191, set out as a note under section 1181 of this title.

1993 Acts. Except as otherwise provided, amendment by section 4301(c)(4) of Pub.L. 103–66 effective Aug. 10, 1993, see section 4301(d) of Pub.L. 103–66, set out as a note under section 1021 of this title.

1989 Acts. Section 7894(f)(2)(B) of Pub.L. 101–239 provided that: "The amendment made by this paragraph [amending subsec. (b)(5)(C) of this section] shall take effect as if included in section 301 of Public Law 97–473 [amending this section and enacting provisions set out as notes under this section]."

Section 7894(f)(3)(B) of Pub.L. 101–239 provided that: "The amendments made by this paragraph [amending subsec. (b)(6)(B) of this section] shall take effect as if included in section 302 of Public Law 97–473 [amending this section and section 1002 of this title and enacting provisions set out as a note under section 1002 of this title]."

1986 Acts. Section 9503(d)(2) of Pub.L. 99–272 provided that:

"(A) Except as provided in subparagraph (B), the amendment made by paragraph (1) [adding subsec. (b)(8) of this section] shall become effective on October 1, 1986.

"(B) In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified on or before the date of the enactment of this Act [Apr. 7, 1986], the amendment made by paragraph (1) shall become effective on the later of—

"(i) October 1, 1986; or

"(ii) the earlier of—

"(I) the date on which the last of the collective bargaining agreements under which the plan is maintained, which were in effect on the date of the enactment of this Act [Apr. 7, 1986], terminates (determined without regard to any extension thereof agreed to after the date of the enactment of this Act [Apr. 7, 1986]); or

"(II) three years after the date of the enactment of this Act [Apr. 7, 1986]."

1984 Acts. Amendment by Pub.L. 98–397 applicable to plan years beginning after December 31, 1984, except as otherwise provided in sections 302(b), (c), (d) and 303 of Pub.L. 98–397, see section 302(a) of Pub.L. 98–397, set out as a note under section 1001 of this title.

1983 Acts. Section 301(c) of Pub. L. 97–473 provided that: "The amendment made by this section [enacting subsec.